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Déjà vu All Over Again?

Planning for the New "New Normal"

As was widely reported, Congress passed, and the President signed, the Tax Cuts and Jobs Act ("TCJA") at the end of 2017. The TCJA made some significant changes to federal estate and gift tax laws.

Notably, the estate and gift tax exclusion amount is now nearly $11,200,000 per person (up from $5,490,000 per person in 2017). The new exclusion amount will be adjusted for inflation. Like EGTRRA, the landscape-changing tax act passed in 2000 at the beginning of the George W. Bush administration, TCJA's exclusion amount increase has a sunset provision built into it; therefore, it will revert to the previous amount on January 1, 2026, eight years from the effective date. The gift tax annual exclusion for 2018 has increased to $15,000, due to inflation adjustments.

What does this mean for you? For most people, it means they will not owe gift or estate tax. Even at the elevated values in place prior to the TCJA, a married couple could give or devise almost $11,000,000 ($5,490,000 each) free of federal transfer tax. Very few American citizens have $11,000,000. Under the TCJA, a married couple can give or leave almost $22,400,000. According to the Tax Policy Center, as reported in the Wall Street Journal, only about 1,700 estates are expected to owe estate tax in 2018 out of about 82.7 million deaths. Nevertheless, if you do have assets in this range, there may be some significant opportunities to make gifts using these larger exemptions.

If your assets are less than the current exclusion amount, you should determine whether your estate plan should be updated in light of the tax law changes. Many individuals have tax-based formulas in their estate plans that should be reviewed in light of these doubled exemptions. Many individuals still have plans in place that were prepared pre-EGTRRA, or that were prepared when the increased exemptions were being phased in ten or fifteen years ago. These plans may not be optimal in the current tax landscape and, therefore, should be reviewed and possibly revised.

As noted above, these increased exclusion amounts are scheduled to drop in half in 2026. Therefore, even if you would not have an estate tax if you died today, you may have one if you die after the exemptions have reset to last year's levels. This should be considered and taken into account by your estate plan.

Finally, a word about portability. Portability allows a surviving spouse to make an election to use the unused estate and gift tax exclusion of the first spouse to die. Again, while you may not need a second $11,000,000 exclusion, you may need the additional exclusion when the exclusion resets in 2026. Portability does require a timely filed federal estate tax return ("Form 706"). The surviving spouse should seek timely advice about whether to file a Form 706 following the first spouse's death. The generation-skipping transfer ("GST") tax exemption is not portable, so specific planning will need to be undertaken if it is desirable to use the GST exemption of both spouses. The GST exemption has also been increased to an amount equal to the estate and gift tax exclusion.

This is only a brief summary of the changes made to the federal estate and gift tax laws by TCJA. If any of the issues raised in this summary would seem to impact your planning, you may wish to make an appointment to discuss the application of the law to your specific situation.

SPRING 2018 NEWSLETTER

SMALL ASSETS, BIG HEADACHES

The smallest assets can create some of the biggest headaches when someone dies. We often see cases where the larger assets pass smoothly, such as the house, retirement assets, life insurance, investment accounts and bank accounts. Then wrinkles appear with smaller assets that have minimal value and yet are difficult and costly to deal with. The following are some examples:

Mineral Interests. Sometimes there is a lack of good record keeping about mineral interests, which can make it difficult to determine what mineral interests are owned. If you own mineral interests, even if you only receive small royalty payments (or no payments), keep good records of what you own. In particular, keep deeds, leases and division orders. In many cases, the family does not know the mineral interest exists, especially if no royalty payments are being received. The family may open and then close the estate without properly dealing with the minerals. When they later find out about the minerals, the estate must be re-opened, with added expense.

Out-of-State Property. If you reside in Colorado but own property out-of-state, ancillary probate may be required in that other state in order to transfer the property at your death. Some states have a more efficient process than other states but, in any event, added cost will be required for ancillary probate. If you own property in other states, there may be options to streamline the transfer of that property at your death.

Timeshares. Timeshares are notoriously difficult to deal with after death. Even if no one wants them, they cannot necessarily be abandoned. So, if you have a timeshare that your family will not want, it is a good idea to explore options to get rid of it during life. Doing so can be easier said than done, but at least you will be attempting to deal with the problem, rather than leaving the problem with your family.

Co-Owned Property. If you co-own an asset with someone else (especially someone other than your spouse), what is going to happen with that asset at your death? Sometimes these assets can be more of a liability than an asset, because you are obligated to contribute to insurance, property taxes and other costs, and yet you cannot sell the property without agreement of all of the owners. For example, if you and your two siblings co-own a family cabin, will your spouse and kids want your interest in the cabin at your death? If not, there isn't a market for your estate to sell your one-third interest, so your spouse and kids may be stuck keeping it or just giving it to your siblings. You could avoid this dilemma with proper planning, such as having a written agreement that your siblings will buy out your interest at your death.

Our clients often tell us that they want to make everything as easy as possible on their family when they pass away, and minimize costs. One of the steps to help achieve these goals is to make sure all assets, including even the smallest ones, will pass as efficiently as possible upon your death. We can advise you in this regard as part of the estate planning process.

Timeshare Facts:

Timeshare vacation plans have been around since 1969 and generate over $8.6 billion in annual sales. 1 out of every 12 Americans owns a timeshare.

(Source: American Resort Development Association)

USING YOUR IRA FOR CHARITABLE GIFTS

The Tax Cuts and Jobs Act of 2017 substantially increased the income tax standard deduction, which means that far fewer people will itemize deductions. If you are one of the many people who will claim the standard deduction, you will not receive a federal income tax deduction for charitable gifts. However, you may still be able to obtain an income tax break for gifts to charity by using your IRA to fund your charitable gifts. This technique is commonly referred to as a charitable rollover.

If you take a withdrawal from your IRA, you will report that amount on your income tax return as taxable income. If you then use that amount to make a gift to charity, you will not be able to deduct the donation on your federal income tax return if you claim the standard deduction. Therefore, there is no federal income tax benefit with the gift.

With the charitable rollover, instead of you withdrawing from your IRA, you direct that an amount be distributed directly from your IRA to a charitable organization. The key aspect of this approach is that you are not taxed on the withdrawal. Therefore, you still claim your standard deduction, and in addition you get funds to charity income tax free.

There are some limitations on the charitable rollover. For example, it's only available if you are age 70 ½ or older. The rollover is capped at $100,000 per year. Charitable rollovers to donor-advised funds are not permitted. Also, the funds must pass directly from the IRA to charity, not to you.

The charitable rollover has been available for several years but is more relevant for many people in light of the changes made with income tax laws. Therefore, it may make sense for you to consider the charitable rollover even if it wasn't a good fit for you in the past.

Keep in mind that with the charitable rollover you do lose some Colorado income tax benefits that you receive if you instead withdraw from the IRA and then gift that amount to charity. With this latter approach, you may be able to claim the Colorado charitable deduction, which is available to you when you claim the standard deduction for federal purposes, and also claim the Colorado pension subtraction.

LOST AND (Sometimes Never) FOUND

Keep Your Original Documents

In this era of digital storage of documents, electronic banking and record keeping, e-filing tax returns, etc., it may be tempting to think that copies of legal documents, whether saved in paper form or digitally, will suffice. A copy is not always sufficient when it comes to what the law requires. For example, it is extremely important to have originals of the following documents:

Wills. Following a death, the original will is sent to the court in order to open probate. In Colorado, the process of admitting the will to probate is generally very straightforward, assuming the original will is located and there are no challenges to the validity of the will. A copy of the will, even showing the signatures, is not an original, and will not be treated as an original. Therefore, if the original will cannot be found then the will is presumed to have been revoked. A copy of the will can often be admitted to probate, but it requires formal probate rather than informal probate, and proof is required that the will was merely lost as opposed to revoked.

Stock Certificates. If a stock certificate is lost, it may be necessary to post a bond in order to replace the original. For example, if it becomes necessary to retitle stock certificates (such as following a death) and if the certificate cannot be found, a bond may need to be purchased in order to obtain a new stock certificate. This can be an issue with stock in closely-held business interests or ditch stock companies for water rights.

Promissory Notes. If you make a loan and have the borrower sign a promissory note, keep the note in a safe place. The borrower can require that you produce the original when the loan is paid off and then mark the note as cancelled. In fact, if the note is secured by a deed of trust, then the original note must be cancelled and sent to the Public Trustee in order to release the deed of trust. If the original cannot be located, a bond must be posted, which costs money.

There are other types of legal documents where an original may be required, so do not assume that making a copy is sufficient or even a good idea. Keep your originals safe.

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About Tom and Jennifer

Tom Stover and Jennifer Spitz have worked together for the past 20 years. They are both graduates of The University of Colorado School of Law where they each graduated in the top 10% of their respective classes. The following are a few of their accomplishments:

Tom and Jennifer are both listed in ***Colorado Super Lawyers***®. The Colorado Super Lawyers listing is based upon peer review and includes only the top five percent of Colorado attorneys.

Jennifer and Tom are both listed in ***Best Lawyers In America***®, which is widely regarded as the preeminent referral guide to the legal profession in the United States. Tom was named the Best Lawyers® 2014 Denver area Trusts and Estates "Lawyer of the Year." Jennifer received a similar recognition in 2016, and was named 2018 Boulder area Tax Law "Lawyer of the Year."

Jennifer and Tom are both members of the American College of Trust and Estate Counsel (***ACTEC***). ACTEC is a nonprofit association of lawyers and law professors skilled and experienced in the field of estate planning and estate administration. Tom served as the ACTEC Colorado state chair for five years. Tom and Jennifer regularly attend the national and regional ACTEC meetings, where current developments in the law and taxes are discussed.

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